JUDGMENT OF THE COURT (Ninth Chamber)

22 January 2015 (*)

(Reference for a preliminary ruling — Directive 77/388/EEC — VAT — Exemptions — Article 13B(b) — Concept of ‘exempted letting of immovable property’ — Provision, for consideration, of a football stadium — Contract for provision reserving certain rights and prerogatives to the owner — Supply, by the owner, of various services representing 80% of the charge specified in the contract)

In Case C?55/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d’appel de Mons (Belgium), made by decision of 31 January 2014, received at the Court on 5 February 2014, in the proceedings

Régie communale autonome du stade Luc Varenne

v

État belge,

THE COURT (Ninth Chamber),

composed of J. Malenovský, acting President of the Ninth Chamber, M. Safjan (Rapporteur) and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Régie communale autonome du stade Luc Varenne, by W. Panis, avocat,

– the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents,

– the Greek Government, by I. Bakopoulos and V. Stroumpouli, acting as Agents,

– the Netherlands Government, by M. Bulterman and M. Gijzen, acting as Agents,

– the European Commission, by C. Soulay and L. Lozano Palacios, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 13B(b) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member

States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) (‘the Sixth Directive’).

2 The request has been made in proceedings between the Régie communale autonome du stade Luc Varenne (the autonomous municipal corporation of the Luc Varenne stadium: ‘the corporation’) and the Belgian State concerning the deductibility of value added tax (VAT) charged on the acquisition of the facilities of the Luc Varenne football stadium, amounting to EUR 1 350 001.79.

Legal context

European Union law

3 Article 2 of the Sixth Directive, which is part of Title II thereof, headed ‘Scope’, provides:

‘The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

…’

4 Article 13 of that directive, headed ‘Exemptions within the territory of the country’, provides in point B thereof, headed ‘Other exemptions’:

‘Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

…

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. hire of safes.

Member States may apply further exclusions to the scope of this exemption;

…’

5 The content of the provision of the Sixth Directive referred to in the preceding paragraph was repeated, virtually unchanged, in Article 135 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which constitutes the recasting of the Sixth Directive and its successive amendments.

6 Article 17(2)(a) of the Sixth Directive (now Article 168 of Directive 2006/112) reads as follows:

‘In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) [VAT] due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person.’

Belgian law

7 Article 19(1) of the code de la taxe sur la valeur ajoutée (‘the VAT Code’), in the version applicable to the main proceedings, provides:

‘The use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or, more generally, for purposes other than those of his business shall be treated as a supply of services for consideration where the VAT on that asset is wholly or partly deductible.’

8 Article 44(3) 2° of the VAT Code provides that the following transactions are exempt from VAT:

‘leasing, rental and letting of immovable property, and the use of such property on the conditions stated in Article 19(1) with the exception of:

(a) supplies of the following services:

– the provision of sites for parking vehicles;

– the provision of sites for the storage of property;

– the provision of furnished accommodation in hotels, motels and establishments where paying guests are accommodated;

– the provision of camping sites;

(b) financial leasing of buildings agreed by an undertaking engaged in the financial leasing of buildings or rental classified as leasing of buildings, where that undertaking builds, causes to be built or acquires, subject to tax, the building to which the contract relates and where the lessee takes that building on lease to use in the pursuit of a taxable activity; the King shall define the conditions to be satisfied by a financial leasing contract of buildings, in particular as regards the duration of the contract, the nature and purpose of the property to be the subject-matter of the contract and the rights and obligations of the lessee;

(c) hire of safes.’

9 Article 45(1), 1° of the VAT Code provides:

‘A taxable person may deduct from the tax which he is liable to pay the tax which has been charged on goods and services supplied to him, on goods he has imported and on his intra-Community acquisitions of goods, in so far as he uses them to carry out:

1° taxable transactions …’

10 Article 1 of the arrêté royal No 3, du 10 décembre 1969, relatif aux déductions pour l’application de la taxe sur la valeur ajoutée (Royal Decree No 3 of 10 December 1969 on deductions for the application of VAT) provides:

‘1. Subject to the application of Article 45(1a), (2) and (3) of the [VAT] Code, a taxable person shall be entitled to deduct taxes charged on goods and services used to effect transactions referred to in Article 45(1)(1) to (5) of the Code, in accordance with Articles 2 and 4 of this Decree.

Where a taxable person, in the course of his economic activities, effects other transactions which do not give rise to entitlement to deduction, he shall comply, for the determination of the deductions, with Articles 46 and 48 of the [VAT] Code and with Articles 12 to 21 of this Decree.

2. Under no circumstances shall taxes charged on goods and services which a taxable person intends for private use or purposes other than those falling within his economic activity be deductible.

Where a good or service is intended to be partially used for such purposes, the deduction shall not be allowed in so far as it is so used. The extent thereof shall be determined by the taxable person under the supervision of the authorities.’

The main proceedings and the question referred for a preliminary ruling

11 The corporation runs the Luc Varenne football stadium, for the purchase of which it had to pay the sum of EUR 6 428 579.97, with the addition of VAT amounting to EUR 1 350 001.79.

12 On 25 August 2003 the corporation entered into a contract with Royal Football Club de Tournai ASBL (‘RFCT’) under which RFCT uses, for consideration, the facilities of the Luc Varenne football stadium.

13 The corporation deducted the whole of the VAT charged on the purchase of those facilities.

14 Following two inspections at the offices of the corporation in 2004 and 2006, the Belgian tax authority considered that the corporation was effecting a number of transactions with regard to VAT, namely:

– transactions subject to VAT and in respect of which there is a right to deduct input VAT;

– transactions outside the scope of VAT and in respect of which there is no right to deduct input VAT, such as the provision to RFCT, free of charge and without consideration, of certain facilities at the Luc Varenne football stadium, and

– transactions which are exempt from VAT and, consequently, in respect of which there is no right to deduct input VAT.

15 The Belgian tax authority therefore considered that the provision of certain facilities at the abovementioned stadium to RFCT on the terms of the contract entered into with the corporation had to be regarded as a letting of immovable property and, consequently, had to be exempted from VAT under Article 44(3), 2° of the VAT Code.

16 In the written record drawn up on 22 December 2006, the Belgian tax authority stated that an analysis of the corporation’s activities using the method of actual use demonstrated that the corporation could deduct input VAT only to the level of 36%, in accordance with the rule for pro rata deduction of VAT referred to in Article 46(2) of the VAT Code.

17 On 10 January 2007 the Belgian tax authority issued a summons to the corporation demanding payment of that part of the VAT which it had incorrectly deducted, namely a sum of EUR 864 001.15, a fine amounting to EUR 86 400, late payment interest and default interest.

18 The corporation challenged that summons before the court of first instance in Mons which, by judgment of 12 May 2011, held that the supply by the corporation of certain facilities at the Luc Varenne football stadium to RFCT had to be classified as a letting of immovable property and that the tax authority had been correct to refuse deduction of input tax. The corporation brought an appeal against that judgment before the cour d'appel de Mons.

19 Taking the view that the resolution of the dispute before it depends on the interpretation of certain provisions of the Sixth Directive, the cour d'appel de Mons decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the making available of the facilities of a sports installation used exclusively for footballing purposes, understood as being the right to use and enjoy the football stadium playing surface (the pitch) and the players' and referees' changing rooms on an ad hoc basis for up to 18 days per season (a season starting on 1 July each calendar year and ending on 30 June the following year), constitute an exempt letting of immovable property for the purposes of Article 13B(b) of [the Sixth Directive] (Article 135(1)(*l*) of Council Directive 2006/112), in so far as the party granting the right of use and enjoyment:

– is fully entitled to confer identical rights on other natural or legal persons of its choice in respect of days other than the 18 days referred to above;

– has the right to obtain access to those facilities at any time, without the prior consent of the party to whom the right of use and enjoyment is granted, in order, in particular, to satisfy itself as to the proper use of the facilities and to pre-empt any damage, on the sole condition that it does not disrupt the smooth running of sports events;

– retains, in addition, a right of permanent control over access to those facilities, including during the period of their use by RFCT;

– charges a flat-rate fee of EUR 1 750 per day for use of the playing surface, the changing rooms, the bar and the caretaking, surveillance and monitoring service for the facilities as a whole, it being understood that it has been agreed between the parties that, of the amount charged, 20% represents the right of access to the football pitch and 80% the consideration for various services connected with maintenance, cleaning, upkeep (mowing, grass sowing etc.) and ensuring regulatory compliance of the playing surface and ancillary services supplied by the party granting the right of use and enjoyment …?'

Consideration of the question referred for a preliminary ruling

20 By its question, the referring court seeks to ascertain, in essence, whether Article 13B(b) of the Sixth Directive must be interpreted as meaning that the act of making available, for consideration, a football stadium under a contract reserving certain rights and prerogatives to the stadium owner and providing for the supply, by the owner, of various services, including services of maintenance, cleaning, repair and upgrading, representing 80% of the charge which is agreed in the contact to be payable, constitutes a 'letting of immovable property' for the purposes of that provision.

21 According to settled case-law, the fundamental characteristic of the concept of 'letting of

immovable property' for the purposes of Article 13B(b) of the Sixth Directive lies in conferring on the other party to the contract, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right. In order to determine whether a contract falls within that definition, account should be taken of all the characteristics of the transaction and the circumstances in which it takes place. The decisive factor in this regard is the objective character of the transaction at issue, irrespective of how that transaction is classified by the parties (judgment in *MacDonald Resorts*, C?270/09, EU:C:2010:780, paragraph 46 and case-law cited).

22 It must also be recalled that, for there to be letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive, all the conditions characterising that transaction must be satisfied, that is to say, the landlord of property must have assigned to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it (judgment in *Medicom and Maison Patrice Alard*, C?210/11 and C?211/11, EU:C:2013:479, paragraph 26 and case-law cited).

23 Article 13B(b) of the Sixth Directive constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person and it must therefore be interpreted strictly. If one of the conditions referred to in the preceding paragraph is not fulfilled, that provision may not be applied by analogy on the ground that a letting within the meaning of that provision is what the use of immovable property at issue most closely resembles (see, to that effect, the judgment in *Medicom and Maison Patrice Alard*, EU:C:2013:479, paragraph 27).

24 As a general rule, it is for the national courts, which alone are competent to assess the facts, to establish, in the light of the specific circumstances of each case, the essential characteristics of the transaction in question in order to classify it under the Sixth Directive (see, to that effect, inter alia, the judgment in *Medicom and Maison Patrice Alard*, EU:C:2013:479, paragraph 33 and case-law cited).

25 As regards, more specifically, the classification of the use of sporting facilities, the Court has previously stated that services linked to the practice of sport or physical education must, so far as is possible, be considered as a whole (judgment in *Stockholm Lindöpark*, C?150/99, EU:C:2001:34, paragraph 26).

26 Accordingly, with regard to the letting of a golf course, the Court has stated that since the activity of running a golf course entails not only the passive activity of making the course available but also a large number of commercial activities, such as supervision, management and continuing maintenance by the service-provider and the provision of other facilities, letting out a golf course cannot, in the absence of quite exceptional circumstances, constitute the main service supplied (the judgment in *Stockholm Lindöpark*, EU:C:2001:34, paragraph 26).

27 Admittedly, the circumstances in the main proceedings differ from those of the transaction at issue in the case which gave rise to the judgment in *Stockholm Lindöpark*, (EU:C:2001:34), given that, first, the main proceedings concern a 'collective' use of facilities by a club, and not individual access by players; second, that use is repetitive and extended and, in principle, is exclusive on the agreed days, and, third, the duties and prerogatives of the corporation as lessor seem, in part, to be dictated by what is inherently necessary for the use, for rental purposes, of sporting facilities which may host a wide range of bodies and individuals.

28 The Court must however state that the order for reference does not suggest, without prejudice to the assessment of the facts which is the task of the referring court, that there are quite exceptional circumstances which permit the conclusion that the use of the football ground

constitutes the main service supplied in the transaction, so that the transaction can be classified as a letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive.

29 In the circumstances of the main proceedings, what seems to be involved is the supply, by the corporation, of a more complicated service consisting of provision of access to sporting facilities, where the corporation takes charge of the supervision, management, maintenance and cleaning of those facilities.

30 As regards, first, supervision, namely the rights of access to the sporting facilities and the control of that access conferred on the corporation, it is true that those rights cannot, in themselves, preclude the classification of the transaction at issue in the main proceedings as a letting within the meaning of Article 13B(b) of the Sixth Directive. Such rights may be justified in order to ensure that the use of those facilities by the lessees is not disturbed by third parties. The Court has previously stated that the presence of restrictions on the right to occupy the premises let does not prevent that occupation being exclusive as regards all other persons not permitted by law or by the contract to exercise a right over the property which is the subject of the letting contract (judgment in *Temco Europe*, C?284/03, EU:C:2004:730, paragraph 25).

31 In the circumstances at issue in the main proceedings, the rights of access to the sporting facilities and the control of that access seem none the less to have the effect, by means of a caretaking service, that representatives of the corporation are permanently present at those facilities, which could be evidence to support the view that the role of the corporation is more active than that which would arise from a letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive.

32 As regards, secondly, the various services of management, maintenance and cleaning, it appears that they are, for the most part, actually necessary to ensure that the facilities in question are suitable for the use for which they are intended, in other words sporting events and, more specifically, football matches in accordance with the applicable sporting regulations.

33 It must therefore be held that the facilities required for that purpose are, by means of the offered services of repair and upgrading, made available to RFCT in a condition which permits their use for the agreed purposes and that the provision of access to those facilities for that specific end constitutes the supply which is characteristic of the transaction at issue in the main proceedings (see inter alia, by analogy, the judgments in *Part Service*, C?425/06, EU:C:2008:108, paragraphs 51 and 52; *Field Fisher Waterhouse*, C?392/11, EU:C:2012:597, paragraph 23; and *RR Donnelley Global Turnkey Solutions Poland*, C?155/12, EU:C:2013:434, paragraph 22).

34 In that regard, the economic value of the various services supplied, those representing, according to the order for reference, 80% of the charge which is agreed in the contract to be payable, also constitutes evidence which supports the classification of the transaction at issue in the main proceedings, considered as a whole, as a supply of services rather than as a letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive.

35 That said, it is for the referring court to assess whether all the services offered by the corporation are in fact necessary in order to provide access to the sporting facilities for the purposes agreed in the contract, that is exclusively for the purposes of football.

36 As regards, last, the length of the period of enjoyment of the property concerned, which is an essential element of a lease, it must be recalled, first, that the Court has previously had occasion to hold that, as regards a golf course, the period may be restricted (judgment in *Stockholm Lindöpark*, EU:C:2001:34, paragraph 27).

37 Second, in accordance with the case-law, that enjoyment must not, as a general rule, be occasional and temporary (see, to that effect, the judgment in *Leichenich*, C?532/11, EU:C:2012:720, paragraph 24).

38 In the circumstances at issue in the main proceedings, the length of the period of enjoyment specified in the supply contract concerns a maximum of 18 days when football is played, such a period not being *a priori* negligible. The referring court will however have to assess whether, in the light of all the circumstances, the contractual period of enjoyment should rather be classified as being occasional and temporary, which would be additional evidence in support of the view being taken that the transaction at issue in the main proceedings, considered as a whole, should be classified as a supply of services rather than as a letting of immovable property. In that regard, it needs in particular to be ascertained whether, as argued by the Belgian Government, the facilities of the Luc Varenne football stadium are, in addition to what is stated in the contract, actually made available to RFCT on a less ad hoc basis or whether, as submitted by the corporation, the actual period of enjoyment is limited solely to football matches.

39 In the light of the foregoing, the answer to the question referred is that Article 13B(b) of the Sixth Directive must be interpreted as meaning that the act of making available, for consideration, a football stadium under a contract reserving certain rights and prerogatives to the stadium owner and providing for the supply, by the owner, of various services, including services of maintenance, cleaning, repair and upgrading, representing 80% of the charge which is agreed in the contact to be payable, does not constitute, as a general rule, a ‘letting of immovable property’ within the meaning of that provision. The finding of the facts is for the referring court.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 13B(b) the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, must be interpreted as meaning that the act of making available, for consideration, a football stadium under a contract reserving certain rights and prerogatives to the stadium owner and providing for the supply, by the owner, of various services, including services of maintenance, cleaning, repair and upgrading, representing 80% of the charge which is agreed in the contact to be payable, does not constitute, as a general rule, a ‘letting of immovable property’ within the meaning of that provision. The finding of the facts is for the referring court.

[Signatures]

* Language of the case: French.